Supreme Court, U.S.
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No. 00-1861

IN THE

Supreme Court of the United States

MEMPHIS HOUSING AUTHORITY,

Petitioner,

v.

TARA THOMPSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

REPLY BRIEF

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Petitioner Memphis Housing Authority ("MHA") respectfully submits this Reply to Respondent Tara Thompson's Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioner Memphis Housing Authority.

REASONS FOR GRANTING THE WRIT

I. A BASIS FOR CERTIORARI DOES EXIST.

A. Review Is Appropriate Because A Conflict Exists Between *Rucker* and State Courts Concerning the Meaning of 42 U.S.C. § 1437d(l)(6).

A principal purpose for which the Supreme Court uses its certiorari jurisdiction is to resolve conflicts among the United States Appellate Courts and the state courts concerning the meaning of provisions of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), citing *Supreme Court Rule* 10.1.

The United States Court of Appeals for the Ninth Circuit in the case of *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001) and the Supreme Court of Tennessee in *Memphis Housing Authority v. Thompson*, 38 S.W.3d 504 (Tenn. 2001); App. at 1a. have both dealt with the question of whether, pursuant to 42 U.S.C. § 1437d(1)(6), a public housing authority ("PHA") has the authority to evict for drug-related criminal activity by tenants, household members, guests and/or other persons. The two courts arrived at conflicting interpretations of subsection (6).

The *Thompson* court in finding strict liability stated:

> After due consideration, we hold that the lease agreement imposes strict liability for drug-related criminal activity engaged in by the tenant or any household member but permits eviction for the drug-related criminal activity of "guests and other

> persons under [the tenant's] control" only if the tenant knew or should have known of the drug-related criminal activity and failed to take reasonable steps to halt or prevent the illegal activity.

Thompson, 38 S.W.3d at 505; App. at 3a.

The *Rucker* court held that knowledge of the drug-related criminal activity by the tenant was required to evict for conduct by household members outside the tenant's unit. *Rucker v. Davis*, 237 F.3d 1113, 1126 (9th Cir. 2001). The *Rucker* holding is in direct conflict with the holding in *Thompson* as it relates to household members.

Respondent asserts that *Thompson* did not issue a "holding" regarding household members. However, the language in *Thompson*, as can be seen from the above quote, speaks for itself and, "[t]his Court's appellate jurisdiction does not turn on such semantic niceties." *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 317, 105 S. Ct. 3180, 3187, 87 L. Ed. 2d 220 (1985).

In addition, *Rucker* affirmed the district court's grant of preliminary injunction and directives related thereto, including permission to pursue evictions when drug-related activity occurs within a tenant's apartment, thereby creating a rebuttable presumption that a tenant controls what occurs in his or her unit. *Id.* at 1127. The *Rucker* court explained, "these directives are perfectly consistent with our interpretation of control in § 1437d(l)(6)." *Id.* at 1127.

The Tennessee Supreme Court ruling in *Thompson* clearly reflects that the court was not creating such a rebuttable presumption and, indeed, expressly held otherwise. The court explained:

> The phrase "under the resident's control" permits eviction only if MHA establishes that Thompson

> knew or should have known of the drug-related criminal activity "of a guest or other person" and failed to take reasonable steps to prevent or halt it.

Thompson at 512-513; App. at 41a.

Hence, contrary to respondent's, argument, the holding in *Thompson* is not "in fact entirely consistent with *Rucker*," even with regard to drug-related conduct by guests within a tenant's unit.

B. Review Is Appropriate Because A Conflict Exists Between *Thompson* and State Courts Concerning the Meaning of 42 U.S.C. § 1437, *et seq.*

Respondent's reading of *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700 (Minn. 1999), is not sound. One of the primary tasks before the *Lor* court was to, "determine PHA eviction powers." *Id.* at 702. The *Lor* court decided the matter by interpreting the United States Housing Act and related HUD regulations, as did the courts in *Rucker* and *Thompson*. *Id.* at 702-703. The *Lor* court held that the housing authority had the discretion to evict a tenant because of her son's criminal activities. *Id.* While the tenant was out of town, the son, who was a household member, was involved in a drive by shooting. *Id.* The next day, the police found illegal guns at the apartment. *Id.* at 702. In deciding the issue, the *Lor* court assumed that the tenant, "did not have any knowledge of her son's activity or reasons to anticipate her son's acts." *Id.* The *Lor* court upheld the eviction because the household member was involved in the criminal activity, the activity was a breach of the lease, and the tenant's knowledge was not required. *Id.*

A clear conflict exists between *Lor* and *Thompson* on the question of whether a tenant's knowledge of criminal activity engaged in by a household member or guest is required prior to the eviction proceedings.

C. The Question Presented Is Ripe for Review.

There is no bar to this Court's review of nonfinal judgments of the lower federal courts and, if necessary, reversing a court of appeal's judgment in summary disposition fashion. *See Mazurek v. Armstrong*, 520 U.S. 968, 975, 117 S. Ct. 1865, 1868, 138 L. Ed. 2d 162 (1997); *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 317, 105 S. Ct. 3180, 3187, 87 L. Ed. 2d 220 (1985). The Respondent seeks to support its position by relying on the holding in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967). That holding is inapplicable. The *Bangor* case involved the scope of an arbitration award issued in a union dispute. This Court denied certiorari in *Bangor* because the Court of Appeals had remanded the matter for further findings prior to rendering a decision regarding the issue of whether a restraining order had been violated. *Id.* 389 U.S. at 327-328, 88 S. Ct. at 438. Contrary to *Bangor*, the Tennessee Supreme Court has rendered a decision with regard to the federal issue in the *Thompson* case and remanded the case to the trial court for adjudication in conformity with the standard adopted in the court's ruling. Therefore, the Tennessee Supreme Court, by way of its interpretation of § 1437d(1)(6) set the legal standard to be used in the instant case and every PHA "criminal activity" eviction proceeding case to follow in the State of Tennessee.

Although 28 U.S.C. § 1257 requires that the Supreme Court review final judgments from the highest court of a state, this Court in its discretion, may make a determination as to what constitutes a final decision under the § 1257 requirement. In *Forgay v. Conrad*, 147 U.S. 201, 6 How. 201, 12 L. Ed. 404 (1848), the Court noted the following regarding final decisions:

> The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict,

> technical sense of that term. But this court has not heretofore understood the words "final decree" in this strict and technical sense, but has given to them a more liberal, and as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

Id. at 203.

The Petitioner avers that, notwithstanding the fact that this case has been remanded to the trial court for further adjudication, a final decision has been made with regard to the federal issue which effectively established a standard and a precedent that lower courts of Tennessee will be forced to follow. For this reason, the decision of the Tennessee Supreme Court should, for purposes of appellate review by this Court, be considered final.

It is well established that a judgment may be considered final even when additional proceedings are required on remand to lower state courts, if the higher court's decision effectively determines the litigation. *See North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 94 S. Ct. 407, 38 L. Ed. 2d 379 (1973) in which this Court granted certiorari after the case was remanded by the state supreme court for an administrative hearing.

In *North Dakota State Board of Pharmacy*, the Court, in determining that the finality requirement of 28 U.S.C. § 1257 was met, stated, "this concept of finality has a penumbral area." *Id.* at 410 (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945)). This position was also taken in *Mills v. Alabama*, 384 U.S. 214 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) involving a proceeding in which the state supreme court upheld the constitutionality of a state statue and remanded the case to the trial court. This Court deemed the judgment

to be final despite the fact that the case had been remanded to the trial court for adjudication.

Perhaps the most instructive decision on the issue of finality is this Court's ruling in the case of *Cox Broadcasting Corporation et al. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975). In an opinion delivered by Mr. Justice White, this Court recognized that under certain circumstances, a departure from the finality requirement was warranted and federal appellate jurisdiction would be proper under 28 U.S.C. § 1257, even when further state court proceedings were required due to a remand by a higher court. The Court noted further that these situations were not particularly rare and that at least four categories of such cases existed in which the Court had, "treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and taken jurisdiction without awaiting the completion of the additional proceedings anticipated by the lower state courts." *Id.* at 477.

The first two categories noted by the Court consist of cases in which the federal question would not be mooted by the future proceedings for various reasons, i.e., "the proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* The other two categories consist of cases in which the federal issue would be mooted if, "the petitioner or appellant seeking to bring the action here prevailed on the merits in the later state court proceedings, but there is nevertheless sufficient justification for immediate review of the federal question finally determined in the state courts." *Id.* at 478 and 479.

The Petitioner submits that this matter is within the above categories and therefore, this case represents a matter which would warrant a more pragmatic approach to the issue of finality and would also warrant a departure from the standard finality requirement.

D. The Thompson Decision Has Immediate Consequences On Other Tennessee PHAs and Other Tenants.

It is respectfully submitted that the *Thompson* ruling will have an immediate adverse effect for MHA and PHAs in their ability to provide safe and affordable housing to tenants. An immediate and adverse consequence of the *Thompson* ruling is that there will be an impaired ability of MHA and other PHAs to take advantage of a Congressionally granted weapon against illegal drug trafficking and its attendant violence. It is respectfully submitted that the *Thompson* ruling in effect amends the federal legislation by imposing conditions on the use of the drug eviction powers that Congress expressly declined to impose. The ultimate effect is that tenants now have less protection. This reason supports certiorari. *See Mazurek*, *supra*, at 975, 1868.

II. THE PETITIONER'S CLAIM OF ERROR DOES SUPPORT AN ISSUANCE OF A WRIT OF CERTIORARI.

Respondent' s argument that an erroneous interpretation of the law is not a basis for review in this case lacks merit. In the two cases cited by respondent in support of their position, this Court granted certiorari. *See Ross v. Moffitt*, 417 U.S. 600, 604, 94 S. Ct. 2437, 2441, 41 L. Ed. 2d 341 (1974) and *Watt v. Alaska*, 451 U.S. 259, 264, 101 S. Ct. 1673, 1677, 68 L. Ed. 2d 80 (1981).

In the concurring opinion cited by respondent in *Watt*, *supra*, Justice Stevens joined in the majority opinion on the merits. *Watt* at 451 U.S. at 276, 101 S. Ct. 1683. However, he wrote a concurring opinion to voice his disagreement to the extent certiorari was granted to review the court of appeals' interpretation of the federal Wildlife Refuge Revenue Sharing Act of 1935. He did so because in his

opinion, the lower courts interpretation, "did not conflict with any other judicial decision and there is no reason to anticipate that a comparable issue will arise in another Circuit in the foreseeable future." *Id.*, 451 U.S. at 274, 101 S. Ct. at 1682. Petitioner submits that the interpretation of 42 U.S.C. § 1437d(1)(6) rendered by the Tennessee Supreme Court conflicts with interpretations of the same law by other state courts and federal appellate courts. Additionally, it is undisputed that the issue will arise in the near future in other federal and state courts. Hence, *Watt* supports certiorari in this case.

The issue in *Ross*, a criminal case, was whether an indigent defendant was entitled to appointment of counsel on his petitions for review by the State Supreme Court and this Court. *See Ross* at 417 U.S. 602-603, 94 S. Ct. at 2440. The Court held he was not entitled to such an appointment, but explained that even without such an appointment, he was not denied fair access to either court in light of the record below and the courts' discretionary review. *Id.* at 417 U.S. at 615-617, 94 S. Ct. at 2446-2447.

The law as interpreted by the Tennessee Supreme Court and the legal standard established by the court clearly conflicts with other State and federal appellate courts. Contrary to respondent' s position, the Court has discretion to grant review here.

III. THIS COURT SHOULD NOT DELAY ITS REVIEW OF THIS MATTER BUT SHOULD DIRECT THE FEDERAL AND STATE COURTS ON THE PROPER STANDARD OF THE FEDERAL LAW TO AVOID FUTURE CONFLICTS.

The Supreme Court Rules provide for review of conflicts within the federal courts, conflicts among the United States Courts of Appeals and the state courts as to proper interpretations of federal law. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); Supreme Court Rules 10(a) and (c).

This Court is not required to delay acting and wait until federal and state courts reach uniformity or additional conflicts arise in the interpretation of section 1437d(l)(6). Such a delay in this case is unwarranted and has the potential to cause irreparable harm to the tenants of this Nation's many Housing Authorities.

CONCLUSION

For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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